Supreme Court, U.S.
FILED

(1) 941072 DEC 15 1994

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

BRUCE A. OLSEN
Assistant Attorney General
Counsel of Record

ROBERT A. SELK
Acting Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2580

Attorneys for Petitioners

December 15, 1994

139 PP

QUESTIONS PRESENTED

The public employer's motion for summary judgment claiming a federal right to qualified immunity was denied in a case where the public employee claimed violation of his First Amendment right to free speech. The questions presented relate to the ability of the public employer to lawfully discharge an employee who held the highest position in the agency and served at the pleasure of the employer when the employer was faced with facts that led to a reasonable belief that (1) the employee had seriously mismanaged the agency and (2) the employee's speech was not on a matter of public concern. The questions presented are:

1. Did the Wisconsin Supreme Court create a standard for deciding qualified immunity on summary judgment different than that permitted by the United States Supreme Court by holding, in effect, that a public employer cannot reasonably believe that an employee discharge following alleged free speech activity is lawful if there is any interpretation of the facts which would support a conclusion that the discharge was in retaliation for the exercise of First Amendment rights?

2. Is a public employer entitled to qualified immunity if he considers facts known at the time of the discharge which overwhelmingly support a reasonable belief that a high level at-will employee had seriously mismanaged the agency and undermined its mission, or must he ignore these facts unless the mismanagement was "related" to the employee's speech?

LIST OF PARTIES

The parties to the trial court proceedings below were the petitioners James R. Klauser, Eugene G. Martin, Edward E. Hales, Maureen J. Busby, Richard H. Lillie, and Nicholas Hurtgen, the respondent Marshall Burkes, defendant and third-party plaintiff M. William Gerrard, and third party-defendants Acceleration National Insurance Company and Rural Mutual Insurance Company.

M. William Gerrard, Acceleration National Insurance Company, and Rural Mutual Insurance Company were not parties to the Wisconsin Supreme Court proceeding, and are not interested parties in this petition for certiorari.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

A. Statement of Facts 4

B. How the Federal Question Was Presented 8

C. The Wisconsin Supreme Court's Analysis of the Public Employer's Duty 9

REASONS FOR GRANTING THE WRIT 15

I.

The Wisconsin Supreme Court's Qualified Immunity Standard Deprives Public Employers of the Protection that Qualified Immunity is Designed to Assure, and Will Inhibit Employers from Fearlessly Exercising Reasonable Judgments to Ensure Effective Agency Operations, by Forcing Them to Ignore What They Know About the Employee's Speech and

Performance, and Forcing Them to Trial Whenever a Set of Inferences Raises the Possibility that the Employee was Engaging in Protected Speech. 15

II.

Certiorari Should be Granted to Give State and Federal Courts Guidance About How Qualified Immunity Defenses are to be Analyzed Where the Court Must Consider the Objectively Reasonable Belief of the Decisionmaker to Decide a Motion for Summary Judgment. 24

III.

The Wisconsin Supreme Court's Decision Creates a Precedent Which will Undermine First Amendment Jurisprudence if Unreviewed Because it Creates a Different Standard for Qualified Immunity Analysis in State Courts Considering the Qualified Immunity Defense. 27

CONCLUSION 30

INDEX TO APPENDIX

Wisconsin Supreme Court decision, June 24, 1994 . . . . . App. 1

Wisconsin Supreme Court reconsideration order, September 21, 1994 . . . . . App. 47

Wisconsin Court of Appeals decision, March 10, 1993 . . . . . App. 47

Wisconsin Court of Appeals decision, January 12, 1993 ..... App. 55

Dane County Circuit Court decision denying summary judgment motion, September 1, 1992 ..... App. 58

Wisconsin Court of Appeals decision denying leave to appeal from denial of motion to dismiss, February 5, 1991 ..... App. 83

Dane County Circuit Court decision denying motion to dismiss, January 21, 1991 ..... App. 84

Excerpts of Marshall Burkes' deposition relating the content of his statements to the Investment Board trustees, from Affidavit of Bruce A. Olsen ..... App. 94

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Creighton,
483 U.S. 635 (1987) 16, 17, 25, 26

Bartlett v. Fisher,
972 F.2d 911 (8th Cir. 1992) 20, 29

Benson v. Allphin, 786 F.2d 268 (7th Cir.),
cert. denied, 479 U.S. 848 (1986) 20, 29

Callaway v. Hafeman,
832 F.2d 414 (7th Cir. 1987) 12

Connick v. Myers,
461 U.S. 138 (1983) 10, 20, 27

Cross v. City of Des Moines,
965 F.2d 629 (8th Cir. 1992) 25

Davis v. Scherer,
468 U.S. 183 (1984) 16

Egger v. Phillips, 710 F.2d 292 (7th Cir.)
(en banc), cert. denied,
464 U.S. 918 (1983) 10

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991),
cert. denied, ___ U.S ___,
112 S.Ct. 1242 (1992) 23

Felder v. Casey, 487 U.S. 131 (1988) 27, 29

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16, 28

Hesse v. Bd. of Educ. of Tp. High School Dist. 211, 848 F.2d 748 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) . . . 11, 13, 22

Hunter v. Bryant, 502 U.S 224, 112 S.Ct. 534 (1991) 16, 24, 25

Jeffries v. Harleston, 21 F.3d 1238 (2d Cir.1994), *cert. granted, judgment vacated, case remanded sub nom. Harleston v. Jeffries*, ___ U.S. ___, 63 USLW 3385, 1994 WL 388592 (U.S.) (1994) 26

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 12

Malley v. Briggs, 475 U.S. 335 (1986) 16

Marquez v. Turnock, 967 F.2d 1175 (7th Cir. 1992) 11, 23

McDonnell v. Cournia, 990 F.2d 963 (7th Cir. 1993) 25

Mitchell v. Forsyth, 472 U.S. 511 (1985) 16

Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977) 22, 26

Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251 (7th Cir. 1985) 11

Pickering v. Board of Education, 391 U.S. 563 (1968) 13, 18, 19, 20 21, 22, 23, 25, 26, 27

Pierson v. Ray, 386 U.S. 547 (1967) 15

Rakovich v. Wade,
850 F.2d 1180 (7th Cir.) (en banc),
cert. denied, 488 U.S. 968 (1988) 28

Rankin v. McPherson, 483 U.S. 378,
reh'g denied, 483 U.S. 1056 (1987) 28

Vukadinovich v. Bartels,
853 F.2d 1387 (7th Cir. 1988) 10

Waters v. Churchill, ___ U.S ___, 114 S.Ct. 1878,
128 L.Ed.2d 686 (1994) 11, 12, 19, 26, 27

Yoggerst v. Stewart,
623 F.2d 35 (7th Cir. 1980) 12

Zaky v. U.S. Veterans Administration,
793 F.2d 832 (7th Cir.),
cert. denied, 479 U.S. 987 (1986) 10

Statutes

28 U.S.C. § 1257(a) 3

42 U.S.C. § 1983 ..... 3, 8, 29

Sec. 15.76, Wis. Stats. 4

Sec. 25.15, Wis. Stats. 4

Sec. 25.156(2), Wis. Stats. 5

Constitutional Provisions

U.S. Const. Amendment 1 3

U.S. Const. Amendment 14 3

No.

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioners James R. Klauser, Eugene G. Martin, Edward E. Hales, Maureen J. Busby, Richard H. Lillie, and Nicholas Hurtgen respectfully request that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court, denying them qualified immunity on respondent Marshall Burkes' First Amendment retaliation claim, entered in the above-entitled proceeding on June 24, 1994.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 185 Wis. 2d 309, 517 N.W.2d 503 (1994), and is reprinted in the Appendix at App. 1. The September 21, 1994, order of the Wisconsin Supreme Court denying petitioners' motion for reconsideration is reprinted in the Appendix at App. 47. The opinions of the Wisconsin Court of Appeals denying qualified immunity to petitioners have not been reported. The Wisconsin Court of Appeals' March 10, 1993, decision which modifies and affirms the court of appeals' January 12, 1993, opinion, and the January 12, 1993, opinion, are reprinted in the Appendix at App. 47 and 55, respectively. The September 1, 1992, memorandum decision and order of the Dane County Circuit Court denying petitioners' summary judgment motion based on qualified immunity has not been reported. It is reprinted in the Appendix at App. 58.

The January 21, 1991, memorandum decision of the Dane County Circuit Court denying petitioners' motion to dismiss based on qualified immunity has not been reported. It is reprinted in the appendix at App. 84. The February 5, 1991, order of the Wisconsin Court of Appeals denying petitioners leave to appeal from the January 21, 1991, denial of the motion to dismiss has not been reported. It is reprinted in the appendix at App. 83.

JURISDICTION

The judgment and opinion of the Wisconsin Supreme Court was entered on June 24, 1994. A timely motion for reconsideration was denied on September 21, 1994.

The jurisdiction of this Court to review the judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment 1, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment 14, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory or the District of Columbia, subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of Facts.

The State of Wisconsin Investment Board (Investment Board) is an agency of the State of Wisconsin composed of eight trustees; five of whom are citizen members with significant experience in investments. The agency has fiduciary responsibility to provide professional investment management of funds entrusted to it by state law, including the pension funds of all state employees. Secs. 15.76, 25.15, Wis. Stats.

As executive director, Marshall Burkes (Burkes) was the highest level management employee of the agency, and had responsibility for its day-to-day operations. The trustees met once a month to conduct the business of the investment of the pension funds of thousands of state employees as well as a number of separate segregated state funds. R.22:2-4¶¶6-11. Burkes was the crucial management link between the trustees, who set investment policy, and the heads of the investment divisions in the agency, who analyzed investment proposals and did the technical work to invest the funds for the benefit of the annuitants. Id. In

addition to these critical internal functions, Burkes was the chief spokesperson for the Investment Board in the national financial, business, annuitant, and pension communities. Id. He served at the trustees' pleasure. Sec. 25.156(2), Wis. Stats.

On June 23, 1989, eight trustees of the Investment Board voted unanimously to fire the Investment Board's executive director, Burkes, who served at their pleasure. Burkes was discharged after he visited the State Attorney General and State Auditor on June 19, 1989, regarding the Investment Board's policies for handling disclosure of fees paid by the Investment Board's real estate investment partners to their brokers and agents.

The trustees did not know what Burkes told the two officials at the time they fired Burkes; they knew only what Burkes told them he said when he called several of them shortly after the visits. Burkes testified that he told the trustees only that he was concerned about unspecified influence and finders fees.[1] App. 94–99. At a board meeting two weeks earlier, the trustees had unanimously

---

[1] Although the Wisconsin Supreme Court's majority opinion disclaims reliance on what Burkes actually said, the court discussed in great detail what Burkes actually said and discounted the trustees' lack of knowledge of Burkes' statements to the two officials. App. 19–21. What Burkes actually told the two public officials he visited was quite different than anything he had ever told the trustees. App. 7. Burkes' stated concerns to the two public officials were included in a list of 13 questions which he left with the officials but never shared with the trustees. App. 21–22, n.12. Burkes limited his statements to the trustees to the expression of vague concerns about fee disclosure and influence. The trustees argued that they could reasonably conclude from their knowledge of his statements that he was just rehashing their recent decision not to adopt his recommended fee policy. App. 94–99.

rejected a policy Burkes proposed regarding the Investment Board's role in disclosing and determining the fees paid by the Investment Board's real estate investment partners to their brokers and agents. R.15:5:¶13, Ex. H. Burkes assured the trustees at the time of the fee disclosure meeting that he knew of no illegal or improper activities by anyone. R.14:4:¶6.

During the weekend before Burkes visited the two state officials, the trustees scheduled a meeting for June 20, 1989, to discuss progress on the renegotiation of a problem loan. R.10:5:¶¶16-17; R.11:5:¶17. At the June 20 meeting the Investment Board staff member responsible for the renegotiation reported to the trustees that Burkes was interfering with the trustees' directives regarding the renegotiation. R.18:7-9:¶¶27-33. The staff member presented a chronology to the trustees of Burkes' actions which indicated that Burkes had not been keeping the trustees informed of his actions and had been attempting to block the renegotiation without their knowledge. Id.

The trustees also learned on June 20, 1989 that senior management officials of the Investment Board had gone secretly to one of the trustees, a month and a half before Burkes visited the public officials, to plead with him to do something about Burkes' mismanagement of the Investment Board. R.9:3-5:¶¶8-15. Six of the most senior management staff put their concerns in written statements a month before the visits occurred. Id.[2]

---

[2] Justice Wilcox's concurring opinion, App. 43-44, details the dilemma the trustees were in once they had this information:

> Suppose, for instance, the public employer has an employee who occupies an important, even vital government post. Suppose further that this

During the week prior to Burkes' discharge, two of the trustees conducted independent discussions with staff and confirmed the breakdown between Burkes and the senior staff. R.15:5-7:¶¶16-24. This information was reported to the trustees before they voted to discharge Burkes. R.9:5:¶16.

Even before the dramatic June 20 revelation of the extent of Burkes' mismanagement, the trustees had begun to reevaluate Burkes' performance. R.9 through R.16; R.32. After the trustees gave Burkes an outstanding rating in 1988, Burkes proposed an agricultural investment to the Investment Board that was brought in by his "old friends." R.15:3-4:¶¶8-10. This proposal was brought outside the Investment Board's usual staff analysis, and Burkes brought it back even after it was

---

> employee's performance has been so poor, and his behavior so erratic, that the employer is legitimately concerned that its operations are threatened. In fact, it is so concerned that it is on the verge of discharging the employee. Getting wind of this, the employee rushes to the press or to law enforcement officials or even to the employer itself and makes accusations of corruption which may or may not be accurate. I believe that an employer in that situation should not be so intimidated by the fear of litigation that it fails to do what it reasonably believes is in the public interest. ...
>
> The scenario described above is not so different, in my view, from what happened in this case. I believe the pleadings in this case, even when read in a light most favorable to Burkes, amply establish that his relationship with the trustees was deteriorating long before he raised his vague allegations of "influence peddling" and "employee intimidation" to the attorney general.

rejected by the trustees. Id.; R.12:2-3:¶¶2-6. Burkes also tried to control the flow of information to the trustees by instructing a new trustee not to speak with staff. The trustee offered to resign unless he could speak freely with staff; Burkes backed down. R.12:2:¶¶3. The agency budget was seriously overspent early in 1989, and Burkes' handling of the budget shortfall caused friction between Burkes and the state budgeting agency headed by one of the trustees. R.9:3-5:¶¶8-13. As a result of these problems, two trustees counseled Burkes to be more reasonable. R.14:3-4:¶7; R.32:3-4:¶16.

B. How the Federal Question Was Presented.

Burkes brought suit under 42 U.S.C. § 1983 against five of the eight trustees (now petitioners) who discharged him, alleging that their votes were in unlawful retaliation for his statements to the Attorney General and State Auditor. The petitioners filed a motion to dismiss the First Amendment retaliation claim, asserting qualified immunity. The trial court denied the motion to dismiss because it determined that a First Amendment claim had been stated. App. 85. Interlocutory review of that decision was denied. App. 83-84.

After extensive court-ordered discovery, the trustees moved for summary judgment, again asserting qualified immunity. The motion was denied. App. 58 *et seq.* The trial court found the material facts to be undisputed, and found the law clearly established that Burkes' interests in his speech outweighed the petitioners' interests as public employers. App. 58 *et seq.*

The Wisconsin Court of Appeals accepted interlocutory review and found genuine issues of material fact which precluded summary judgment. App. 55 *et seq.* On reconsideration, the same court held that there were

genuine issues of material fact which precluded summary judgment, and held that the trustees' knowledge of Burkes' inability to manage could not be considered in determining whether they were entitled to immunity. App. 48-49, 51.

The Wisconsin Supreme Court accepted review of the question, determined that the material facts were undisputed, and held that the trustees were not entitled to qualified immunity because the law was clearly established that Burkes' speech interests outweighed the trustees' interests as a public employer. App. 1 *et seq.* Two justices of the seven-member Wisconsin Supreme Court did not participate in the decision. App. 40. Two separate concurring opinions were written by Justices Bablitch and Wilcox. App. 40, 41. Justice Wilcox's concurrence in the result, which was joined by two other justices, stated that he was writing separately to express dissatisfaction with the law of qualified immunity. App. 41. The trustees' motion for reconsideration to the Wisconsin Supreme Court was denied without further opinion. App. 47.

C. The Wisconsin Supreme Court's Analysis of the Public Employer's Duty.

The decision of the Wisconsin Supreme Court poses the question of immunity as: "whether, in June, 1989, the defendants knew or should have known that a decision to discharge the plaintiff for certain communications with the Attorney General and the State Auditor would be unlawful." App. 11. The Wisconsin Supreme Court found the facts on which immunity turned to be undisputed, and held that the defendants should have known that they could not lawfully discharge Burkes after his visits with the two public officials. App. 3-4.

The Wisconsin Supreme Court looked first to whether Burkes' speech was on a matter of public concern, as is required by *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). In this analysis, the Wisconsin Supreme Court concluded the *speech to the public officials*[3] was a matter of public concern. In analyzing the question, the court purported to focus on "the specific facts confronting the defendant" App. 15, 17, but the analysis focused on what Burkes actually said in addition to what the trustees knew. App. 17-22. More importantly, the Wisconsin Supreme Court made inferences from the trustees' knowledge favorable to Burkes to construct what the trustees reasonably could have concluded from their limited knowledge of his speech. App. 19. In making these inferences, the court did not focus on the trustees' knowledge of the speech in question, but imputed knowledge to the trustees they did not have by inferring that Burkes had previously expressed the same concerns to the trustees as he expressed to the two officials. App. 19. The Wisconsin Supreme Court rejected the trustees' argument that *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988), supported the trustees' reasonable belief that Burkes' speech was too vague to raise a matter of public concern. App. 18. The court also rejected the trustees' argument based on Seventh Circuit precedent that an employee who goes outside his agency to bring public attention to matters of internal agency policy with which he disagrees, is not speaking on a matter of public concern.[4]

---

[3] The focus on what Burkes actually *said*, rather than what the trustees *knew*, pervades the decision. App. 7, 19, 21-22.

[4] *See, e.g., Egger v. Phillips*, 710 F.2d 292, 317-18 (7th Cir.) *(en banc), cert. denied*, 464 U.S. 918 (1983) (In making accusations against co-employees, "Egger was simply doing his job as a criminal investigator," and his speech "must be considered in a different light"); *Zaky v. U.S. Veterans*

By using summary judgment methodology to draw inferences favorable to Burkes, the Wisconsin Supreme Court concluded that the speech was on a matter of public concern. App. 20. The court cited no authority for the proposition that a public employer making a decision to discharge a high level, at-will public employee was required, at the time of the discharge, to draw all inferences favorable to the employee regarding the content of the speech in question.[5]

Administration, 793 F.2d 832, 838-39 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) ("Dr. Zaky's comments were made as part of an internal process of policy determination, [and therefore] they were not 'a matter of public concern for precisely that reason, even though similar statements in a different context may have appealed to the public's general interest'"), *Hesse v. Bd. of Educ. of Tp. High School Dist. 211*, 848 F.2d 748, 752 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) ("Hesse was not attempting to speak out as a citizen concerned with the problems facing the school district, but was instead attempting to articulate his own disagreement with policies and procedures which he had either failed to apply or refused to follow", and *Marquez v. Turnock*, 967 F.2d 1175, 1178 (7th Cir. 1992) ("In speaking on this issue [relating to the handling of third-party violations of agency regulations], Marquez did not act simply as a member of the general public; it was his *job* to investigate such violations and make recommendations as to the appropriate response"); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir. 1985) (when speaker directly involved in the internal policy being discussed, "additional weight must be given to the supervisor's view that [that] employee has threatened the authority of the employer").

[5] Burkes never told the trustees what he told the two public officials, despite two opportunities to do so: once when he informed them of his visits, and once when he was invited to speak to the trustees before he was discharged. R.25:34-37:¶¶75-76. The court cited a recent case of this Court, *Waters v. Churchill*, ___ U.S. ___ 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994), regarding the duty of a public employer to make inquiry

Once the Wisconsin Supreme Court concluded that the content of Burkes' speech was a matter of public concern, it determined that cases alleging the misuse of public funds, wasteful practices, and mismanagement were "closely analogous" to this case, App. 23–24, and distinguished cases relied on by the employer to establish that the speech was not on a matter of public concern. App. 25–27.

The Wisconsin Supreme Court also drew inferences favorable to Burkes that, in its view, defeated the trustees' reasonable belief that Burkes' visits were motivated by concern over his personal job security. App. 27–28. The court's opinion rejected the employer's inference that Burkes was speaking in order to protect his job, despite Burkes' admission that this was his motivation.[6] App. 27. The court reasoned that it could

---

to determine what Burkes actually said. App. 20–21. While the Wisconsin Supreme Court did not apply the *Waters* holding, it stated: "Nevertheless, had the defendants inquired of the State Auditor or Attorney General or the acting legal counsel who had accompanied the plaintiff (a straightforward and simply process in this case), they would have discovered the type-written list of concerns . . . The list of questions makes clear that the plaintiff was speaking about matters of public concern." App. 21–22. By not applying the *Waters* holding, the Wisconsin Supreme Court acknowledged that the trustees had no duty in 1989 to make such an inquiry.

[6] Burkes' notes from his meetings with the two public officials indicated he was seeking job protection, but the court refused to make inferences favorable to the trustees regarding Burkes' motivation in speaking or consider cases which permitted the trustees to consider motivation as a factor in favor of the lawfulness of the discharge. App. 26–28. *See Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987); *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), and *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980).

not acknowledge that Burkes knew his job was in jeopardy because he was never formally disciplined. App. 26–27. The court rejected the trustees' arguments that no formal warning or progressive discipline was necessary before Burkes was fired, App. 75–80, and that Burkes was seeking job protection, App. 27; R.25:24–25:¶¶54–56, even though these arguments support a reasonable belief that Burkes spoke in order to save his job.

The Wisconsin Supreme Court's opinion then focuses on the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). App. 30–31. This test requires the employer's interest to be considered in light of speech assumed to be on a matter of public concern. The court required the employer to show that *the speech in question* caused actual or potential disruption, and concluded that "[t]he disruptive effect of the plaintiff's speech do not satisfy either standard." App. 31–32.

Most importantly, the Wisconsin Supreme Court refused to consider the information undisputedly possessed by the trustees that Burkes' relationship with them and with the senior management of the agency had completely broken down, because the court thought that while the information was not in dispute, it did not relate directly to the speech in question: "We agree with the plaintiff that under the clearly established law in June, 1989, job performance issues unrelated to the speech were not part of the *Pickering* balance." App. 35. The court did not explain why it rejected the holding of cases such as *Hesse v. Bd. of Educ. of Tp. High School Dist. 211*, 848 F.2d 748, 753 (7th Cir. 1988) which held that the employer was entitled to consider job performance unrelated to the speech in question as part of the *Pickering* balance. The court viewed Burkes' mismanagement to be related solely to whether Burkes would have been discharged anyway; an issue the court

felt could be considered only at a trial on the merits. App. 35.

Justice Wilcox's concurrence in the result expressed misgivings regarding the efficacy of the law of federal qualified immunity to adequately protect public employers who are attempting to act in the best interests of the agencies they operate: "The problem with qualified immunity analysis is that it prevents courts from truly considering all the undisputed facts of the case." App. 42. The concurrence does not question the court's conclusion that job performance information in the hands of the employer must be ignored unless it "relates" to the speech in question, but views this method of analysis to be compelled by this Court's decisions: "*Connick*, *Pickering* and their progeny unduly limit a court's ability to review all undisputed facts when determining whether or not to recognize the defense of qualified immunity," App. 43, and "limit courts to considering solely the employer's speech and the disruptive aspects of that speech." App. 43. In his view, the result is: "[t]he law unrealistically skews this balance, [of the employer's and employee's interest] leaving courts to express fine-sounding platitudes about the need for qualified immunity, but effectively limiting their ability to implement the doctrine." App. 41-42. In his view, public employees may exploit the holding of this case by making vague allegations to insulate themselves from the government's rightful exercise of its duty to ensure effective agency operations. App. 45-46.

REASONS FOR GRANTING THE WRIT

I.

The Wisconsin Supreme Court's Qualified Immunity Standard Deprives Public Employers of the Protection that Qualified Immunity is Designed to Assure, and Will Inhibit Employers from Fearlessly Exercising Reasonable Judgments to Ensure Effective Agency Operations, by Forcing Them to Ignore What They Know About the Employee's Speech and Performance, and Forcing Them to Trial Whenever a Set of Inferences Raises the Possibility that the Employee was Engaging in Protected Speech.

By substituting its view of the facts (including inferences drawn from the facts) for the view reasonably taken by the trustees, the Wisconsin Supreme Court created a qualified immunity standard on summary judgment that deprives public employers of the protection that United States Supreme Court precedent is designed to assure. To comply with the Wisconsin Supreme Court standard, a public employer must not only decide what the facts are before making an employment decision after the employee claims to have spoken, but must consider how those facts could be viewed years later by a court. If there is **any** view of the facts that could arguably support a claim that an employment decision was based on improper retaliation for the employee's speech, the employer will be inhibited from making the employment decision that is in the public's best interest, no matter how reasonable or necessary that decision may be, for fear of the risks and costs of litigation. That result removes the shield of qualified immunity from fearless decisionmaking, and renders illusory the protection afforded by that doctrine. Although *Pierson v. Ray*, 386 U.S. 547, 557 (1967), holds that public officials are "not charged with predicting the future course of constitutional

law," the Wisconsin Supreme Court's qualified immunity standard, in effect, imposes just such a burden on them.

The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), held that government officials are immune from suits seeking money damages unless clearly established law puts them on notice that their conduct violates a plaintiff's federal right. Qualified immunity is the norm, not the exception. It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 345 (1986), and should be granted whenever officials of "reasonable competence could disagree" about the lawfulness of their conduct. *Malley*, 475 U.S. at 341. The entitlement of qualified immunity is immunity from suit rather than a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, immunity is most appropriately addressed and resolved at the summary judgment stage before extensive measures are taken to defend the public official. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 536 (1991).

Qualified immunity shields public decisionmakers from suit for damages if "a reasonable officer could have believed [the challenged action] to be lawful, in light of clearly established law and the information the [officials] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Even officials who "reasonably but mistakenly conclude" that their actions are lawful are entitled to immunity. *Anderson*, 483 U.S. at 641. The "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter*, 502 U.S. at ___, 112 S.Ct. at 537, quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

During the last several months of his employment, Marshall Burkes' job performance and his relationship with the Investment Board's professional staff

deteriorated dramatically. Burkes approached two state officials to discuss his purported concerns about the Investment Board's failure to adopt his proposed policy requiring sellers who attempted to interest the Investment Board in investment opportunities to disclose the fees the sellers paid to their brokers and agents. Burkes' own notes from the meetings indicate he was worried about his job security and was seeking job protection. App. 27, R.25:24–25:¶¶54–56. The Investment Board's trustees knew only what Burkes told them about what was said at the meetings, App. 94–99, and that Burkes had previously denied knowledge that anyone was acting illegally or improperly. R.14:4:¶6. Reasonably believing that Burkes had merely taken his dispute about an internal Investment Board policy to outside officials, the trustees focused their attention on Burkes' mismanagement of the agency and discharged him.

The Wisconsin Supreme Court disregarded the requirement of *Anderson*, 483 U.S. at 641, that on summary judgment qualified immunity must be judged on the basis of "the information the ... officers possessed." The trustees argued to the Wisconsin Supreme Court, in effect: "Burkes told us only that he had unspecified 'concerns' about 'influence' and 'fee disclosure,' and had previously assured us that was not accusing anyone of illegal or even improper behavior. We also had current, verified information that Burkes was seriously mismanaging the agency and that his relationship with the senior staff of the agency had broken down. We can rely on that information and existing precedent in concluding we lawfully discharged Burkes." The Wisconsin Supreme Court concluded, in effect, "No. You must assume that when Burkes said he had a concern about 'influence,' he was 'complaining about outsider influences on the trustees' (App. 19), and that you were being "charged with misfeasance" (App. 33), even though you have information that he denied any improper

activity. You must assume that when Burkes said he told the Attorney General and the State Auditor that he was concerned about 'fee disclosure,' he was 'attempting to focus the attention of two agencies upon the Investment Board's use, or possible misuse, of public funds' (App. 19), even though you considered the fee disclosure policy only two weeks earlier, and Burkes disclaimed that public funds were being misused. And you may not take his mismanagement into account at all".

Under the guise of employing summary judgment procedure, App. 12-13, the Wisconsin Supreme Court would require public employers to conduct the First Amendment "public concern" analysis by speculating about what the employee said, and only inferring facts most favorable to the employee's claim of protected speech. The employer must disregard reasonable inferences to the contrary unless he is prepared to take the risk of trial. Instead of exercising judgments based on reasonable beliefs, the Wisconsin Supreme Court apparently expects employers to use an inference-drawing procedure which mirrors the analysis done by courts. Only when an employer could draw no inferences favorable to the employee which would support a claim of protected speech, could an employer proceed without the risk of trial. The immunity, therefore, is lost for the very type of decisionmaking it was designed to protect. The immunity is meaningful only if it protects a decision made through the exercise of judgment; not a decision where opinions could not differ and therefore judgment is not necessary.

The artificial and unworkable character of the Wisconsin Supreme Court's summary judgment standard is even more apparent in the *Pickering* interest balancing it requires public employers to undertake. The trustees had in their possession current, verified, and undisputed information that Burkes, the agency's highest ranking employee and the trustees' link to the operation of the

agency, was interfering with the ability of the professional staff to perform their functions, was undermining the morale of the staff, and was subjecting the agency to risk of financial loss and tort liability. Under the Wisconsin Supreme Court's formulation of the *Pickering* analysis, public employers cannot consider those facts as part of their "interest ... as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. 563, 568 (1968), but could only consider either the actual or potential disruptive effects of the employee's speech itself. App. 31-32. Moreover, the Wisconsin Supreme Court would require public employers to balance the disruptiveness of the employee's speech not against what they actually knew about that speech, but against the hypothetical speech constructed from inferences favorable to the employee. In this case, the Wisconsin Supreme Court required the trustees to balance disruptiveness against Burkes' hypothetical statements "charg[ing them] with misfeasance," and raising "the potential exposure of misuse of public monies and undue influence," App. 33; then faulted them for offering only "bald assertions of the disruptive effect of plaintiff's speech". App. 32. The Wisconsin Supreme Court did not explain how an employer could predict the disruptiveness of an employee's speech when the employer did not know what was said.

The Wisconsin Supreme Court's standard would require public employers to disregard the actual facts in their possession when they make employment decisions, and to instead analyze their acts by reference to hypothetical constructs about how others might view the situation at a later date. The standard is virtually impossible for employers to meet, and reflects the policy concerns expressed by the plurality decision in *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1888, 128 L.Ed.2d 686, 700 (1994):

> The problem with the [Wisconsin Supreme Court's] approach--under which the facts to which the Connick test is applied are determined by the judicial factfinder--is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw.
>
> ....
>
> Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

Most courts which have considered qualified immunity in contexts where fact-specific balancing is required, have concluded that immunity is the norm in such cases. At least six circuits, including Seventh Circuit, have concluded that, because of the "fact-intensive balancing test" required by *Pickering*, "it can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard." *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992) (citing cases); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) ("[Q]ualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required"). The Wisconsin Supreme Court's disregard for the qualified immunity standards articulated by this Court turns the *Connick* test and the *Pickering* balance on summary judgment from a factbound, case-by-case analysis to a bright-line rule: If there is any inference from which a factfinder could conclude that an employee

was speaking on a matter of public concern, the employer can never conclude that the employee's speech was unprotected. Further, the employer's interest in the effective functioning of the agency will never outweigh the employee's interest in speaking unless the employer can demonstrate that there was disruption or potential disruption caused by the speech itself. No amount of bad performance could ever outweigh an employee's alleged exercise of protected speech.

This bright-line rule turns the presumption in favor of immunity into a presumption against immunity. The public employer who acts after a claim of protected speech will be forced to trial and will therefore be restrained in exercising his duty and authority in the public interest. This result is especially startling in this case, because the trustees had a fiduciary duty to act in the interest of the annuitants which is arguably violated by keeping a person in the position of executive director after knowledge of serious mismanagement.

The summary judgment standard adopted by the Wisconsin Supreme Court imposes an impossible burden on the ability of public employers to raise qualified immunity defenses in those cases where protection of public decisionmaking is the most necessary; cases where competing inferences could be drawn from the facts known to the decisionmaker. This is exactly the type of situation that led to the caution in *Pickering* that First Amendment claims must be considered on a case-by-case basis. 391 U.S. at 569. The trustees established that the information available to them supported the reasonable belief that Burkes was speaking on a matter of mere private concern because he was going outside the agency to rehash a policy he had unsuccessfully promoted as part of his employment responsibilities two weeks earlier, citing existing precedent which supported the lawfulness of that belief. *See* cases cited at footnote 4. The Wisconsin Supreme Court rejected the trustees' reliance

on these cases, because they were not factually analogous to Burkes' speech, which the court erroneously characterized from inferences drawn most favorably to Burkes.

Public employers also cannot rely on information of a high-level employee's mismanagement. The Wisconsin Supreme Court concluded *Pickering* constrained it to consider "only the disruptive effects of the speech in question ... in conducting the balancing test," App. 31, and not what reasonable officials in the position of the trustees would likely regard as the most salient piece of information in their possession--that the agency's highest-ranking employee, who served at their pleasure, was seriously mismanaging the agency, but in ways unrelated to his speech activity. App. 34. The Wisconsin Supreme Court held, without citing any authority, that "under the clearly established law in June 1989, job performance issues were not part of the *Pickering* balance," and the trustees' information about Burkes' unsatisfactory job performance could be considered only at trial, as part of the trustees' causation defense under *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977). App. 34.

The Wisconsin Supreme Court inexplicably ignored authority existing in June 1989, and re-affirmed in later cases, which authorizes public employers to consider performance issues unrelated to the employee's speech as a factor in the *Pickering* balance. *See Hesse v. Bd. of Educ. of Tp. High School Dist. 211*, 848 F.2d 748, 753 (7th Cir. 1988) ("In striking a proper [*Pickering*] balance, *it is essential that we note the increasing hostility and deteriorating employment relationship which had been developing between the plaintiff and his supervisors for*

almost five years preceding the alleged adverse job action") (emphasis added).[7]

The summary judgment standard devised by the Wisconsin Supreme Court creates incentives for public employees to create job tenure outside of state law, by "making vague allegations of corruption in order to secure an immunity of their own, an immunity from government's rightful exercise of its duty to ensure effective operations." App. 44 (WILCOX, J., concurring). Under the Wisconsin Supreme Court's standard, every public employee who is discharged after saying "I have a concern about influence peddling" or "I have a concern about the expenditure of public funds" is the victim of retaliation for the exercise of clearly established First Amendment rights, and can force his employer to trial to defend the discharge decision on the merits, no matter how vague the speech or unsatisfactory the employee's performance may have been. This effect is especially pernicious in an agency which has a fiduciary duty to the people it serves, as does the Investment Board.

The Wisconsin Supreme Court's admonition that even serious management breakdowns, if arguably "unrelated" to the speech, cannot be considered a factor in

---

[7] The Wisconsin Supreme Court rejected the trustees' reliance on *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1242 (1992), and *Marquez v. Turnock*, 967 F.2d 1175 (7th Cir. 1992), which confirm *Hesse*'s holding that an employer may take into account the deteriorating nature of the employment relationship, because the cases were decided after June 1989. App. 34. Each of those cases holds that a deteriorating work relationship existing prior to an employee's speech and unrelated to that speech, is a proper factor in the *Pickering* balance. There is no legal authority which prohibits an employer from relying on precedent created after its decision to establish the lawfulness of its decision.

the lawfulness of the discharge, places employers in the dilemma of violating either (1) their duty to the people they serve, or (2) the First Amendment free speech rights of the employee. Unless a public employer is willing to incur the human and financial costs of a jury trial, the immunity standard created by the Wisconsin Supreme Court decision effectively precludes the employer from acting when an employee makes any statement from which a court could later infer matters of public concern, even though a reasonable employer would not have drawn that inference from the statement. It is exactly this dilemma, leading to gridlock in decisionmaking, that the immunity is designed to prevent. *Hunter*, 502 U.S. at ___, 112 S.Ct. at 537.

II.

Certiorari Should be Granted to Give State and Federal Courts Guidance About How Qualified Immunity Defenses are to be Analyzed Where the Court Must Consider the Objectively Reasonable Belief of the Decisionmaker to Decide a Motion for Summary Judgment.

The United States Supreme Court has given only the most general guidance to courts about the proper standard for summary judgment based on grounds of qualified immunity where the claimed constitutional right depends for its existence on a consideration of the objectively reasonable belief of the person whose action is being challenged. The Wisconsin Supreme Court's decision correctly quotes the general principles of immunity, but creates a standard of analysis which so undermines the doctrine's underlying policies that three of the five members deciding the case criticize the United States Supreme Court for creating a hollow defense of "fine-sounding platitudes about the need for qualified immunity," App. 42 (WILCOX, J., concurring). The

analysis employed by the Wisconsin Supreme Court, and the analysis it expects public decisionmakers to employ, virtually guarantee that immunity can never be granted on summary judgment, contrary to federal policy that immunity cases be decided prior to trial. While the Wisconsin Supreme Court expressly stated that it was following federal precedent, it actually departed from the precedent and ignored the conflict between its analysis and the legal standard and policies underlying qualified immunity. The frustration expressed in the concurring opinion strongly suggests that lower courts need more specific guidance if they are to correctly apply qualified immunity.

The petitioners submit that this Court's *per curiam* decision in *Hunter* establishes the proper standard for addressing qualified immunity on summary judgment. *Hunter* requires a reviewing court to analyze the record to determine whether there is **any** reasonable basis to conclude that the defendants acted consistent with the plaintiff's asserted rights, 112 S.Ct. at 536. If the facts support a reasonable belief that the challenged action was lawful, the defendant is immune, even if other facts can be fairly inferred. The Seventh Circuit has followed *Hunter*. *See McDonnell v. Cournia*, 990 F.2d 963, 968 (7th Cir. 1993) ("[I]f a case involves a question of whether probable cause existed to support an officer's actions, the case should not be permitted to go to trial if there is *any* reasonable basis to conclude that probable cause existed") (emphasis in original), quoting *Cross v. City of Des Moines*, 965 F.2d 629, 632 (8th Cir. 1992).

This Court's decisions in *Hunter* and *Anderson* tell lower courts to consider **all** the information possessed by the public officials, but this Court's decisions in *Pickering* and its progeny offer courts only limited guidance in determining the factors which can be taken into account. This Court should tell public employers whether they can rely on the *Hunter* and *Anderson* precedents which permit

a consideration of all information, or whether *Pickering* limits the information which may be considered by public employers.

In addition, although this Court has held that public officials will be put on notice of the unlawfulness of their actions only if existing case law makes such unlawfulness "apparent," *Anderson*, 483 U.S. at 640, the Court has not addressed what "apparent" means in situations where existing caselaw proceeds on a fact-bound, case-by-case analysis of multiple, and sometimes inconsistent factors. For example, this Court's decision in *Mount Healthy*, 429 U.S. at 287, establishes employee performance as an appropriate factor in determining liability in First Amendment cases, but the Court has not addressed whether public officials sued for alleged First Amendment violations can base a claim of qualified immunity on that factor. This Court should confirm that "apparent" means that an employer may consider all factors unless existing caselaw expressly prohibits it from doing so.

Very recently, this Court granted certiorari and summarily vacated an employee speech case from the Second Circuit, remanding the case for further consideration in light of *Waters*. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir.), *cert. granted, judgment vacated, case remanded sub nom. Harleston v. Jeffries*, ___ U.S. ___, 63 USLW 3385, 1994 WL 388592 (U.S.) (1994). Among other points, the Second Circuit had concluded, as the Wisconsin Supreme Court concluded in this case, that predictions of disruption were insufficient to justify the discharge of an ineffectively performing, high-ranking state employee, and that the defendants were not qualifiedly immune. 21 F.3d at 1243, 1246-47, 1248-49. The *Harleston* case indicates that there is a need for clarification and guidance to lower courts in determining these questions.

This Court's recent decision in *Waters*, ___ U.S. ___, 114 S.Ct. 1878 (1994), strongly implies that the *Connick* and *Pickering* analyses must be performed on what the defendants reasonably believed the plaintiffs' speech to have been, but the Court in that case declined the opportunity to consider the qualified immunity implications of its decision. 114 S.Ct. at 1891. Therefore, *Waters* does not provide the quidance needed on the qualified immunity question, although its reasoning supports the arguments made by the employer in this case.

III.

The Wisconsin Supreme Court's Decision Creates a Precedent Which will Undermine First Amendment Jurisprudence if Unreviewed Because it Creates a Different Standard for Qualified Immunity Analysis in State Courts Considering the Qualified Immunity Defense.

In our federal system, state court decisions have a role in developing substantive federal law, because state courts have concurrent jurisdiction over federal causes of action. *Felder v. Casey*, 487 U.S. 131, 139 (1988). State courts, however, do not have a free hand in shaping the contours of federally protected rights, and may not employ rules of decision which undermine federal rights or create different outcomes if federal claims are brought in the state or federal courts within a state. *Felder*, 487 U.S. at 139–40, 147, 153.

The Wisconsin Supreme Court's decision has destructive effects on future public employers making tough personnel decisions that affect the functioning of public agencies. The decision creates a precedent which will be examined by public employers seeking answers to whether they can lawfully discharge an employee who

claims free speech rights, as well as by state and federal courts looking for guidance about whether the law was clearly established when the employers acted. Under the *Harlow* immunity standard, prudent public employers who wish to avoid damage liability need to look to existing cases to determine whether their contemplated conduct violates clearly established constitutional norms. State and federal courts searching for closely analogous cases under which to analyze qualified immunity "look at whatever decisional law is available." *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) *(en banc), cert. denied*, 488 U.S. 968 (1988). The Wisconsin Supreme Court decision is part of that body of decisional law, and will have to be taken into account by those decisionmakers.

The Wisconsin Supreme Court held that clearly established substantive First Amendment law prohibits public employers from lawfully discharging their highest-level employees if the employees express unspecified concerns to other public officials, even in the face of overwhelming facts which would lead a reasonable employer to discharge the employee.[8] This decision will be considered by many public employers and courts, because its facts place it in the center of the issues involved in First Amendment qualified immunity jurisprudence. Few decisionmakers will be able to argue that this case is not relevant. It will be the rare case where the employee's speech is more vague than Burkes',

---

[8] Although *Rankin v. McPherson*, 483 U.S. 378, 390-91, *reh'g. den.* 483 U.S. 1056 (1987), counsels that high-level employees bear a special burden of caution when they speak, and the public employers have the greatest amount of discretion when they deal with their highest-ranking employees in whom they must have trust and confidence, the Wisconsin Supreme Court's decision gives no consideration to the public employer's need for flexibility when considering a discharge of these key employees.

or more tangentially raises an issue of public concern. It will be the rare case where the public employee's position is more essential to the operation of the agency which employs him. And it will be a rare case in which the employer's knowledge of mismanagement of a public agency is more clearly established.

In nearly every case which will come before the state or federal courts in the future, a plaintiff will be able to show that his speech interests were stronger than Burkes', and that his employer had less of a legitimate interest in his discharge. The Wisconsin Supreme Court's decision will become the clearly established law that will force upon local, state, and federal government employers the Hobson's choice of disregarding their duty to act in the public interest by discharging an unsatisfactory employee, or acting in the public interest by discharging the employee, with the burdens of litigation and a jury trial the certain cost of such action.

The Wisconsin Supreme Court decision also presents the risk that it will be viewed as a "state court" analysis of the federal immunity standard, which will be applied only in state court. Therefore, there is jeopardy of developing a two-track system for determining questions of liability in cases brought under 42 U.S.C. § 1983. To the extent state courts adopt the Wisconsin Supreme Court's analysis, qualified immunity will become virtually unavailable to public officials in First Amendment cases. To the extent that the federal courts continue the generalized view articulated in *Bartlett*, 972 F.2d at 916, and *Benson*, 786 F.2d at 276, *supra*, that immunity is the rule and liability the exception, public officials will recognize benefits if they remove First Amendment employment cases and other cases involving decisions based on the reasonable belief of the public decisionmaker to federal court. Forum shopping will be encouraged, and the principle of "intra-state neutrality" embraced in *Felder*, 487 U.S. at 153, will be undermined.

CONCLUSION

For these various reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

BRUCE A. OLSEN
Assistant Attorney General
Counsel of Record

ROBERT A. SELK
Acting Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2580

Of Counsel:

WALTRAUD A. ARTS
Quarles & Brady
Post Office Box 2113
Madison, WI 53701
(608) 251-5000

TERRY E. JOHNSON
Peterson, Johnson & Murray
731 N. Van Buren Street
Milwaukee, WI 53702
(414) 271-8800

Attorneys for Petitioners Klauser, Martin, Busby, Lillie and Hurtgen

T. CHRISTOPHER KELLY
145 W. Wilson Street
Madison, Wisconsin 53703
(608) 255-6607
Attorney for Petitioner Edward E. Hales

December 15, 1994